

Position on Trade in Services 2003

Presented by resolution of the Executive Committee of the Greater Miami Chamber of Commerce, on behalf of its International Services Network (ISN). The paper was developed with the assistance of Florida International University's Institute for International Professional Services and the support of the Enterprise Florida, Inc. and private sector organizations and enterprises. With 6,000 members, the Greater Miami Chamber of Commerce is the largest chamber in Florida; the Chamber's pioneer program in international services, known as the ISN, has been recognized by the state and federal government as a successful US model for exporting services. The ISN is funded by the private sector and a grant from the USDOC ITA. All views expressed are strictly private sector recommendations.

Recommendations for the FTAA Agreement Chapter on Services

1. Support bracketed text in the first sentence of Article 1.1 providing that the Chapter applies to "traded in services [in all sectors] [and all modes of supply]. Expand the first sentence of Article 1.1 to include government-owned enterprises by adding the following at the end of such sentence:

... [, including state enterprises engaged in the business of being a service supplier.]
2. Modify text of first sentence of Article 1.1 so that the Chapter has universal application to all service suppliers. The additional language shall change the sentence to read as follows:

1.1 This Chapter applies to ... [and all modes of supply] by [any] service suppliers
3. Article 1.2(c) should not create a blanket exception for procurement by government-owned enterprises. Government-owned enterprises engaged in commercial activities must abide by the same rules applicable to private sector enterprises to avoid disparate treatment and the establishment of non-tariff barriers. Delete the bracketed text "[or a state enterprise]" in Article 1.2(c). We also recommend that the applicable provisions be modeled after the WTO Plurilateral Government Procurement Agreement.
4. Article 1.2(d) should limit the reach of government subsidies, grants, promotional measures, development measures, loans, guarantees, insurance,

tax incentives and other programs that adversely impact trade liberalization measures and this Chapter and the Agreement in general.

5. Article 1.3 should include a definition of “commercial presence” as a test for application throughout this Chapter. The definition should be:

“Commercial presence” means the engagement of a service supplier in commercial activities within a Party’s territory as evidenced by the employment of personnel, establishment of a branch, affiliate, agency or subsidiary, the licensing of its activities or such other indicia of commercial activities as shall create a nexus for taxation of such activities on a non-discriminatory basis.

6. The last sentence of Article 1.3 includes an exception that may adversely impact the trade liberalization and cross-border investment initiatives that are the cornerstones of the Agreement. Delete the last sentence of Article 1.3.
7. Support the second alternate bracketed text for Article 1.6(b) that provides that services will not be supplied by government authorities on a commercial basis or in competition with service suppliers.
8. Article 1.7 should be clarified so that “smaller countries” is limited to those countries defined as a “least developed country” under the IMF-World Bank rating system or by the Commonwealth-World Bank Joint Task Force on Small States. The language of Article 1.7 should be amended by adding the following:

[“Smaller countries” means any Party defined as a “least developed country” under the International Monetary Fund-World Bank rating system. Notwithstanding the generality of the foregoing, nothing in this Article shall be construed in such a manner as shall reduce or adversely affect any measures adopted by any Party in connection with this Chapter and the Agreement.]

9. Article 1.9 should be limited so that new legislation can only be introduced so long as such legislation is not in conflict with MFN or National Treatment. The language of Article 1.9 should be amended by adding the following:

[Notwithstanding the generality of the foregoing, nothing in this Article shall be construed in such a manner as shall reduce or adversely affect any measures adopted by any Party in connection with this Chapter and the Agreement.]

10. Support bracketed text in Article 2.1 that provides for immediate and unconditional MFN treatment for services and service suppliers.
11. See Recommendation No. 8, above. Article 2.3 should be clarified so that “smaller countries” is limited to those countries defined by the as a “least developed country” under the IMF-World Bank rating system.
12. Article 2.10 provides a non-specific exception to benefits potentially available to service suppliers pursuant to the implementation of an agreement under 2.5 by interjecting a requirement that the service supplier have “substantive business operations.” We recommend that the true test be the one stated in Article 1.3 which uses a “commercial presence” standard. Accordingly the last phrase of Article 2.10 should be amended to read as follows:

provided that it [add: has a commercial presence] [delete: engages in substantive business operations] in the territory of the parties to such agreement.

13. Transparency is critical in reducing the transaction costs of business and developing benchmarking of best regulatory practices. Article 3 is fully supported. We suggest clarifying what “emergency situations” means or deleting that specific exception and related language from Article 3.1.
14. See, Recommendation No. 12, above. Article 4.1(c) interjects a requirement that service suppliers have “substantive/substantial business activities/operations.” Article 4.1(c) should be amended to read as follows:

c) when an enterprise ... does not [add: have a commercial presence] [delete: conduct substantial operations] in the territory

Similar change should be added to the bracketed text.

15. See, Recommendation Nos. 12 and 14, above. Article 4.2(b) likewise interjects a “substantial operations” requirement to avoid a denial of benefits under the Agreement. Article 4.2(b) should be amended to read as follows:

b) juridical persons authorized ...that effectively [add: have established a commercial presence] [delete: carry out substantial operations] in the territory of that Party.
16. Article 5 should apply national treatment to the use of subsidies. The following additional language should be added to Article 5.4:

5.4 Formally identical or formally different treatment ... modifies the conditions of competition [~~add:~~ on a discriminatory basis] in favor of services or service suppliers

17. See Recommendation Nos. 8 and 11. Article 5.6 needs to define “smaller countries.”
18. Article 7.1 should ensure that electronic commerce and related telecommunications and broadcast services are not limited by quantitative restrictions. The following additional language should be added to Article 7.1:

[Quantitative restrictions shall not apply to electronic commerce activities, telecommunications and broadcast services utilized by service suppliers to deliver services as permitted under this Chapter.]
19. The first bracketed text for proposed Article 7.2 restricts language so it applies to the use of the “public telecommunications networks.” Such language should be deleted.
20. Support proposed unnumbered Article entitled “Mutual Recognition.” Discriminatory practices in the area of credentials and educational background tend to adversely impact the trade liberalization objectives of the Agreement and must be prohibited.